No. 16-1498

In The Supreme Court of the United States

WASHINGTON STATE
DEPARTMENT OF LICENSING,

Petitioner,

v.

COUGAR DEN, INC., A YAKAMA
NATION CORPORATION,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF *AMICI CURIAE* NEZ PERCE TRIBE AND CONFEDERATED SALISH AND KOOTENAI TRIBES IN SUPPORT OF RESPONDENT AND AFFIRMANCE

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INTERESTS OF THE *AMICI CURIAE*[1]

The Nez Perce Tribe and the Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSKT),[2] prior to and at the time of their 1855 Treaties with the United States, had extensive networks of trade and travel routes throughout a broad geographic area including the Pacific and Inland Northwest. These trade and travel networks continue to be important to these tribes to this day.

These two tribes, in their distinct treaties with the United States, reserved—and the United States expressly "secured" to them—"free access" from their Reservations "to the nearest public highway" and "also the right, in common with the citizens of the United States to travel upon all public highways." 12 Stat. 957, 958 (June 11, 1855) (Nez Perce); 12 Stat. 975, 976 (July 16, 1855) (CSKT).

The Nez Perce Tribe and CSKT are the only other Indian tribes with an expressly reserved treaty right to travel similar to the Yakama treaty right at issue in this case. They write here as *amici* to emphasize the historical and present-day significance of the reserved

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* submitting this brief and their counsel represent that no party to this case nor their counsel authorized this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief. Both parties have consented to the filing of this brief.

[2] The CSKT consists of three tribal nations. The Selis (Bitterroot Salish, sometimes referred to as the "Flathead"), the Qlispe (Upper Pend d'Oreille) and Ksanka (Kootenai).

right to travel. They also write to address misconceptions and flawed assumptions about the treaty right to travel that have been introduced by Petitioner and its supporters.

SUMMARY OF ARGUMENT

The question in this case is whether the Yakama Treaty of 1855 preempts the application of a Washington state fuel tax on fuel imported by a Yakama corporation onto the Yakama Reservation from out of state over a public highway. Indian treaties are the supreme law of the land and preempt state laws that would constrain or abrogate treaty rights; thus the answer to that question depends on the nature and scope of the Treaty's express protection of the right to travel.

This Court's bedrock principles, that Indian treaties must be construed as the Treaty Indians would have understood them under the circumstances, including promises made during treaty negotiations by agents of the United States, were applied correctly by the Washington Supreme Court in its decision below. It relied on the history and context of the Treaty's right to travel provision, which was the subject of fact-intensive findings reached after reviewing hundreds of exhibits and weighing competing Washington and Yakama expert testimony, in *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997) (*Yakama Indian Nation*), *aff'd sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1988) (*Cree II*). This approach was

consistent with federal court decisions that have relied on the historical record to discern and employ the treaty understanding of the Treaty Indians.

The history of Nez Perce and CSKT travel and trade, which were inextricably linked, the context of their treaty negotiations, and the terms of their treaties—the only other treaties with an expressly reserved right to travel similar to the Yakama treaty right at issue—closely track and support the findings made in *Yakama Indian Nation* and affirmed in *Cree II*. And almost immediately post-treaty, hostilities between settlers and local tribes resulted in blocking the road to The Dalles, which the Nez Perce used routinely for trade and travel. Appealing to the Nez Perce Tribe's protection of the right to travel all such roads, Governor Stevens asked for Nez Perce assistance in dealing with the hostilities. Careful examination of the similarly-situated historical context and evidence of understanding of the Treaty Nez Perce and CSKT as to their reserved rights to travel, strongly supports Respondent's position before this Court. And it simultaneously provides contrast to the arguments of Petitioner and its supporters, which can be seen as efforts to construe the treaty right to travel without any examination of the understanding of the Treaty Indians.

The Nez Perce Tribe and CSKT also write to address misconceptions and flawed assumptions introduced by Petitioner and its supporters. Contrary to its arguments, Washington's concerns over lagging fuel tax revenues and increasing transportation infrastructure expenses are not a legal basis for abrogating a

judicially affirmed treaty right. The Nez Perce Tribe and CSKT, and their members, are not involved in any current dispute with Idaho or Montana concerning the treaty right to travel. Idaho and Montana have chosen to enter into fuel tax agreements with the Nez Perce Tribe and CSKT respectively.

As tribes with similar historical records and similar reserved treaty rights, the Nez Perce Tribe and CSKT urge this Court in the case before it to ensure that the Treaty's express protection of the right to travel is given an interpretation consistent with the understanding of the Treaty Indians, as the Washington Supreme Court did below.[3]

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[3] The Tribes note that the primary focus of the United States' *Amicus* brief is that the particular state tax in this case should be characterized as a 'tax on the possession of goods'—an interpretation of state law rejected by that state's supreme court, and addressed in Respondent's Br. at 42-47—that does not implicate the treaty right to travel. U.S. *Amicus* Br. at 18-21. The existence of the United States' similar treaties with the Nez Perce and CSKT counsel caution by this Court with respect to broader issues of treaty interpretation, especially where these tribes are not parties to this case.

ARGUMENT

I. THE TREATY'S EXPRESS PROTECTION OF THE RIGHT TO TRAVEL WAS HISTORICALLY SIGNIFICANT AND MEANINGFUL, AND REMAINS SO.

A. The context, history, and practical construction of the Nez Perce Tribe and Confederated Salish and Kootenai Tribes (CSKT) right to travel treaty provision supports the understanding of the Treaty Indians made in *Yakama Indian Nation*.

The federal courts, in *Yakama Indian Nation* and affirmed in *Cree II*, conducted an extensive factual investigation into the historical context and the understanding of the Indians with respect to the Treaty-reserved right to travel, to determine the nature of this right, naturally focusing in that case on the Yakama. These courts examined the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed. *Id.* The trial court carefully inquired into the intentions of the parties at the time of the Treaty, and considered extensive testimony from three experts (Bill Yallup, Sr., a tribal elder, and Deward Walker, ethnohistorian and archaeologist, on behalf of Yakama; and historian Kent Richards on behalf of Washington) and hundreds of exhibits, and made detailed factual findings and conclusions of law. *Cree II*, 157 F.3d at 774. Washington thoroughly and aggressively litigated the factual and legal issues surrounding interpretation of the Treaty both in the district court and the court of

appeals, and did not seek review by this Court. Naturally, each subsequent case, including this one, has relied upon an application of *Yakama Indian Nation*'s factual findings and conclusions of law concerning the treaty right to travel, to a particular regulation at issue.

The Nez Perce Tribe and CSKT—the other two tribes with a similar treaty-protected right to travel—were not parties to that litigation. An examination of the importance of travel and trade to the Nez Perce and CSKT, the context of their treaties, the history of their treaty negotiations, and the practical construction of their treaties would support the Treaty Indians' understanding of the right to travel set forth in *Yakama Indian Nation* and *Cree II*.

1. The importance of travel and trade to the Nez Perce and CSKT.

The aboriginal territory of the Nez Perce Tribe encompassed more than 13 million acres of present-day north-central Idaho, northeast Oregon, and southwest Washington. The Nez Perce traveled widely beyond that area, including buffalo country to the east and Celilo Falls on the Columbia River to the west. The aboriginal territory of the CSKT covered all of present-day western Montana, and extended into parts of what would become Idaho, Wyoming, and the Canadian province of British Columbia. Members of the Nez Perce Tribe and CSKT traveled that vast landscape and beyond since time immemorial, hunting, fishing,

engaging in cultural activities, and exchanging goods with neighboring tribes through an extensive network of trade routes.

The Nez Perce and CSKT were part of the Plateau culture area, those tribes located on the west side of the Continental Divide of the Rocky Mountains, with aboriginal homelands ranging from the Great Plains to the Columbia River country. Smithsonian Institution 12 HANDBOOK OF NORTH AMERICAN INDIANS, PLATEAU, Deward Walker, Vol. Ed. (1998) (HANDBOOK). Salish, Kootenai, Pend d'Oreille, and Nez Perce people traveled and traded throughout the territory as integral parts of what ethnohistorians and anthropologists have termed the "Columbia River Trade Network." *Id.* at 642-52, 642 (including detailed map of trade network).

The northern crossroads of that network, connecting the Plains to the east with the Columbia River to the west, intersect the heart of CSKT territory. John Upton Terrell, TRADERS OF THE WESTERN MORNING-ABORIGINAL COMMERCE IN PRECOLUMBIAN NORTH AMERICA, 105 (1967).

While the Blackfeet posed a constant danger to tribal members who ventured east across the mountains to hunt and trade, the CSKT continued to travel the ancient routes. The Nez Perce had an expansive trading range as well, from buffalo country to the east, to fishing at Celilo Falls, to appearing with regularity at trading hubs with Coastal tribes at The Dalles of the

Columbia River, to trading with Plains tribes at the Shoshone Rendezvous. HANDBOOK, at 645.

"Early Europeans saw the Columbia Plateau as a walled fortress, isolated and virtually impossible to penetrate through the Rocky Mountain and Cascade ranges that formed its outer defenses." Laura Peers, *Trade and Change on the Columbia Plateau 1750-1840*, 10 COLUMBIA MAGAZINE (1996-1997), at http://www.washingtonhistory.org/files/library/trade-change.pdf (last visited September 20, 2018). However, to the tribes of the region, "the Plateau was the center of the world, linked to the four corners of the continent by well-worn paths and a dense social and economic network." *Id.* As Americans pushed westward into the continent, the earliest explorers experienced the vast trade network developed by the Plateau tribes. Stopping at The Dalles on their journey down the Columbia, Lewis and Clark observed the tribes that traveled there, bringing with them

> [S]kins, mats, silk grass, and bread made from couse root, which they exchanged for wapato, horses, beads, and items from the coastal traders, now retraded. Those from the foothills of the Rockies, such as the Nez Perces, brought beargrass, horses, camas root, as well as buffalo robes and other skins that they had secured, either through their own hunting or in trade with the Flathead. These they exchanged for wapato, salmon pemmican, and trade beads.

HANDBOOK, at 641 (citations omitted).

Following Lewis and Clark's journey, tribes were introduced to the idea of direct trade with the white traders at outposts erected for that purpose. *Id.* at 650-52. The tribes of the Plateau, including the Nez Perce and CSKT, adapted to the changing circumstances. *Id.* "For centuries, Indian tribes have engaged in economic and business activities, developing comprehensive trade associations and transportation routes and offering a variety of products to neighboring Indian tribes and later to non-Indians. Indian tribes carry on these traditions today, although in a different context." TRIBAL NATIONS IN MONTANA: A HANDBOOK FOR LEGISLATORS 38 (2016).

Accordingly, when the Nez Perce and CSKT met in council with the United States to negotiate treaties, maintaining and reserving their right to trade and travel was of the utmost importance. This was well understood by negotiators on both sides.

The concept of travel and trade was well ingrained into the culture and lifeways of the Nez Perce and CSKT (as with Yakama) and was something these tribes expressly retained as a right under their respective treaties with the United States. Grounded in the culture and economy of the tribes, this reserved right remains fundamental to this day.

2. Prior to the Treaty, the United States and Stevens had a long relationship with the Nez Perce and CSKT Indians.

In examining the understanding of the Treaty Indians to the Yakama Treaty, the federal court in *Yakama Indian Nation* thoroughly examined pre-treaty contacts between the United States, Stevens and the Yakama. *Id.* at 1240-42. A similar history between the United States and the Nez Perce and CSKT leading up to similar treaty provisions for these tribes supports the understanding of the Indians set forth by the federal court.

The Nez Perce Tribe and CSKT, like Yakama, had a history with the United States that long preceded the Treaty Council. The Nez Perce had, for example, rescued the Lewis and Clark expedition after it crossed the Bitterroot Mountains.

Stevens, as *Yakama Indian Nation* noted, was Chief Engineer of the Northern Division of the Pacific Railroad Surveys chartered by Congress to ascertain the most expedient transcontinental railroad route, in addition to serving as the Territorial Governor of the Washington Territory, and Superintendent of Indian Affairs for Washington Territory.

Stevens, in all of his roles, was entering a world in which the Nez Perce and CSKT, like the Yakama, already had well-established travel and trade networks, as contemporaneous accounts document, and were well connected with the Yakamas. Securing travel, trade, and transportation routes were fundamental motivations for all parties to these treaties.

Stevens' northern railroad survey party included several groups. Stevens' group, the largest, surveyed west from St. Paul, Minnesota, across the northern plains and mountains to the Washington Territory. Alvin M. Josephy, Jr., THE NEZ PERCE INDIANS AND THE OPENING OF THE NORTHWEST 1965, 1997 edition (Complete and Unabridged), at 293 (NEZ PERCE INDIANS). Stevens had reached Fort Benton in northern Montana on September 1, 1853, and faced the problem, from the perspective of a railroad route, of the prospect of Indian wars on the northern plains. *Id.* at 300-01. He proposed to the Blackfeet that they meet with him in council the following spring to make a lasting peace with the Americans and with the CSKT, Nez Perce, and other tribes that came from the west to hunt buffalo. He then faced the obstacle of finding a route west; he was told of the easy pass to the Bitterroot Valley: "the old buffalo road via Hellgate that the Flatheads and Nez Perces often took to the plains." *Id.* at 301.

Existing Nez Perce and CSKT trade routes proved to be vitally important to and interconnected with both the railway surveys and the treaties. For example, Stevens' railroad report describes how "both routes travelled are perfectly practicable for wagons," how the two trails through the Coeur d'Alene mountains are known as "the northern and southern Nez Perces trails" and how the Walla Walla area "has already attracted the attention of emigrants, and if the Indian title were ever extinguished, it would be rapidly filled up." U.S. War Department, EXPLORATIONS AND SURVEYS FOR A RAILROAD FROM THE MISSISSIPPI RIVER TO THE PACIFIC

OCEAN: REPORT OF EXPLORATIONS FOR A ROUTE FOR THE PACIFIC RAILROAD NEAR THE FORTY-SEVENTH PARALLELS OF NORTH LATITUDE, FROM ST. PAUL TO PUGET SOUND BY I.I. STEVENS (University of Michigan Reprint Series, 2005) (1855) (STEVENS' RAILROAD REPORT) 105, 108. Stevens often directed his survey team to use Nez Perce trails, such as the most southernly Nez Perce trail over the Bitterroots to the Clearwater River and Fort Walla Walla, with the accompaniment of Salish guides. NEZ PERCE INDIANS, at 303. Stevens, meeting large bands of Nez Perce bound for buffalo country, informed them of the promise to hold a council the next spring to make peace with all tribes. Upon reaching Coeur d'Alene, a Nez Perce Indian arrived from Fort Walla Walla with news that the first group of emigrants from the States, under the leadership of a man named James Longmire, had travelled successfully from Walla Walla to Puget Sound the month before over the new Naches Pass Road. NEZ PERCE INDIANS, at 303.

These routes, well known to the Indians and early traders, informed Stevens' railroad and treaty projects.

> Stevens had confirmed the practicability of a northern railroad, but the explorations of the members of his party had, in addition, provided the expedition with considerable information about the geography of the Sahaptin and Salish lands and the best and fastest routes of travel through them. Most of this great interior country had already been well known to the British traders; but at Olympia, Stevens and his men prepared detailed and accurate maps and compiled minute traveling

> memoranda that revealed the secrets of the region for the first time to the American settlers who had bypassed the area on their way to the coast. This information was to be useful during the next few years.

NEZ PERCE INDIANS, at 307.

In the meantime, another survey party, under Captain McClellan, started from Fort Vancouver, and as set forth in *Yakama Indian Nation*, the Yakamas were skeptical of him. As Josephy also explains,

> [The Yakama] knew that white men from the settlements at Puget Sound were already familiar with the Naches Pass and were even then building a wagon road over it. The highway would come out at the Yakima River and run all the way through the Yakimas' lands to Fort Walla Walla where it would connect with the Oregon Trail and give emigrants an opportunity to go to Puget Sound rather than to the Willamette.

NEZ PERCE INDIANS, at 298-99.

Lieutenant Mullan, as part of Stevens' railroad survey, had covered "a huge expanse of territory, although most of it was already thoroughly familiar to the trappers and traders." NEZ PERCE INDIANS, at 309. George Gibbs, a lawyer, ethnologist, and advisor to Stevens and also part of that survey team, reported, the tribes "*require the liberty of motion* for the purpose of seeking, in their proper season, roots, berries, and fish, where those articles can be found, and of grazing their horses and cattle at large." STEVENS' RAILROAD REPORT at 423

(emphasis added). The historical record is clear that prior to the treaty negotiations, both Stevens and the Nez Perce and CSKT, like Yakama, were familiar with the important role of travel and trade routes.

3. The importance of the Treaty right to travel.

a. The Walla Walla Treaty Council, Treaty with the Nez Perces.

The Walla Walla Treaty Council negotiations were carefully examined in *Yakama Indian Nation* and affirmed in *Cree II*, naturally focusing on the Yakamas.

The history and context of the Nez Perce and CSKT treaty negotiations confirm the significance of the treaty-reserved rights to travel to these tribes whose culture and way of life was crucially connected to travel and trade, from buffalo country to The Dalles and the Columbia.

The Nez Perce and Yakama treaties were negotiated at what is commonly referred to as the Walla Walla Treaty Council. As Stevens and the white men spoke, interpreters translated English sentences to Indian criers who announced it in loud voices to the assemblage. The Nez Perce kept their own record of the Council, as depicted in the eyewitness drawings made

by Gustavus Sohon[4] at the Treaty Council, though that record has not been located.

Courtesy Smithsonian Institution.

Treaty Minutes, prepared by the United States, provide a record of Stevens' statements and assurances to the Indians assembled at the Walla Walla Treaty Council.[5]

The Nez Perce were prominent throughout the proceedings at the Walla Walla Treaty Council, which

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[4] Jack Nisbet, *Sohon, Gustavus (1825-1903)*, HistoryLink.org, at http://www.historylink.org/File/8593 (last visited September 20, 2018); see John C. Ewars, GUSTAVUS SOHON'S PORTRAIT OF FLATHEAD AND PEND D'OREILLE INDIANS (1948).

[5] The *Official Proceedings of the Council in the Walla Walla Valley* (Treaty Minutes) were examined by the *Yakama Indian Nation* court.

some members of the CSKT attended. The Nez Perce arrived at the Treaty Council with "considerable ceremony," first planting a United States flag that had been presented to them by officers in the Cayuse War in the valley near the treaty ground. James Doty, JOURNAL OF OPERATIONS OF GOVERNOR ISAAC INGALLS STEVENS OF WASHINGTON TERRITORY (JOURNAL OF OPERATIONS), May 24, 1855.[6] They arrived "all mounted on fine horses" in a show of strength, with at least 29 chiefs and headmen riding in first, followed by some 600 warriors riding two abreast who passed through the camp, then returned to the banner of the United States flag. *Id.*

Courtesy Smithsonian Institution.

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[6] James Doty, Secretary to Stevens, accompanied Stevens on the railroad surveys and assisted Stevens with prior treaty negotiations.

Prior to the opening of the Council, Stevens and James Doty visited Lawyer, a Nez Perce leader, at his lodge at the treaty grounds. *Id.* May 28, 1855. Lawyer explained a map of Nez Perce country he had drawn for Stevens, and Stevens expressed appreciation for Nez Perce friendship since the time of Lewis and Clark. *Id.*

Stevens broached the right to travel early in the Council. On May 31, 1855, Stevens told the Indians present:

> We do not want you to agree not to get roots and berries, and not to go off to the Buffalo: we want you to have your roots and get your berries, and to kill your game; we want you if you wish to mount your horses and go to the Buffalo plains, and we want more; we want you to have peace there.

Treaty Minutes.

Stevens explained further on June 5, 1855:

> You will be allowed to pasture your animals on land not claimed or occupied by settlers, white men. You will be allowed to go on the roads, *to take your things to market*, your horses and cattle. You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites; all this outside the Reservation.

Id. (emphasis added).

> Stevens' knowledge of the importance of the travel and trade routes and resources crucial to the tribe, as well as the relationships between the tribes, is evident when Nez Perce leader Looking Glass arrives at the Treaty Council. Stevens acknowledged that Looking Glass was close by and that "he has come way from the Blackfeet—the buffalo country across the mountain" and then describes his plan that "two or three of us will go and take him by the hand and set him down by his chief in the presence of his friend Kamiakun [of the Yakamas]."

Id. June 8, 1855.

Looking Glass, having learned of the Council in the St. Mary's valley of present-day Montana on his way home to Nez Perce country, "pushed on making the distance of 300 miles in seven days" across the Lolo trail to reach the Treaty Council. JOURNAL OF OPERATIONS, June 8, 1855. Looking Glass' arrival was another show of strength, with his party coming toward the camp "painted and armed, singing a war song, and flourishing from the top of a pole, a newly taken scalp [of a Blackfoot]." *Id.* Looking Glass, without dismounting from his horse, expressed his indignation that, "While I was gone you have sold my country." *Id.*

Stevens, as a result of Looking Glass' arrival and concern about the Treaty, "once more—for Looking Glass' benefit—explained the principal points" of the Treaty on June 9, 1855. Treaty Minutes. Stevens assured the Nez Perce leader and all assembled:

> I will ask of Looking Glass whether he has been told of our council. Looking Glass knows that in this reservation settlers cannot go, that he can graze his cattle outside of the reservation on lands not claimed by settlers, that he can catch fish at any of the fishing stations, that he can kill game and go to Buffalo when he pleases, that he can get roots and berries on any of the lands not occupied by settlers. He knows what the Reservation is . . . and all the other things that have been spoken of: the people all know it, it has been read over two or three times.

Id.

When the Council adjourned that Saturday, no agreement had been reached. *Id.* When the Council opened on Monday, June 11, 1855, "[n]o mention was made of the important fact" that after the Council had adjourned on Saturday, Kamiakun and other Yakamas had signed the Yakama Treaty. JOURNAL OF OPERATIONS, June 11, 1855. The Treaty Minutes document that at some point on June 11, 1855, Lawyer, Looking Glass, and other Nez Perce signed the Treaty; the Treaty Minutes do not reveal the deliberations or pressures that resulted in Nez Perce agreement. After the Nez Perce signed the Treaty, Looking Glass and other Nez Perce accompanied Stevens to the subsequent Treaty Council with the CSKT as well as the "common buffalo treaty" council with the Blackfeet at Fort Benton.

On June 23, 1855, an article signed by Stevens appeared in the *Oregon Weekly Times* announcing,

prematurely, that all areas outside the reservations were open to settlement. NEZ PERCE INDIANS, at 337-38. This is widely acknowledged as leading to the hostilities that broke out in the coming months, including those that blocked the road to The Dalles—an event that, as described below, led Stevens to emphasize the Nez Perce treaty right to travel.

b. The Hellgate Treaty Council, Treaty with the CSKT.

After leaving the Walla Walla valley, Governor Stevens traveled through Nez Perce country, collecting a delegation of Nez Perce to attend the Blackfoot Council, then passed over the "southern Nez Perce Trail" to hold a council with the CSKT. JOURNAL OF OPERATIONS, July 7, 1855.

Courtesy Smithsonian Institution.

On Saturday, July 7, 1855, Stevens selected a location for the Treaty Council at Council Grove, where the Bitterroot River flows into the Clark Fork River (what Stevens referred to as "Hellgate") near present-day Missoula, Montana. The Indian people at the Council expected to discuss the establishment of peace between the Salish and Kootenai and their encroaching enemies, the Blackfeet, not land cessions. BIGART AND WOODCOCK, IN THE NAME OF THE SALISH AND KOOTENAI NATION—THE HELLGATE TREATY AND THE ORIGIN OF THE FLATHEAD INDIAN RESERVATION 1 (1996). Prior to the formal Council, prominent Salish, Kootenai, and Pend d'Oreille leaders met with Stevens, who said to them:

> You have heard I suppose of the Council at Walla Walla and what was there said to the Indians. The treaties made there were fully explained. We made treaties with the Nez Perces and others, numbering in all some 6000 Indians, and placed them on reservations. I wish to make with you treaties similar to those made at that place, and on Monday I will speak to you about it and explain all things fully; but in the meantime the Flatheads and Nez Perces who came up with us were present at that council and can tell you all about it.

Official Proceedings of the Council in the Bitter Root Valley, in Albert J. Partoll, The Flathead Indian Treaty Council of 1855, 29 PACIFIC NORTHWEST QUARTERLY 283 (July 1938) (Hell Gate Treaty Minutes).

In opening the formal Treaty Council on July 9, 1855, Stevens emphasized that several CSKT members had been present at the Walla Walla Treaty Council and his intent "to make with you a treaty similar to the treaty I made with the Nez Perces." Hellgate Treaty Minutes, at 287.

Governor Stevens, seeking to conclude the Treaty Council four days later and facing tribal leaders reluctant to sign the document, explained the provisions of the treaty as including a reservation of land as their exclusive homeland, along with the right to carry on their traditional way of life throughout their aboriginal lands:

> You have the right however to pasture your animals at other places if those places are not occupied by the whites. You have in like manner the right to gather roots and berries, to take fish and kill game. *You have also the right to go on to the roads of the whites and take your produce to market.* The Great Father has the right to make roads through your country if necessary.

Hellgate Treaty Minutes, at 302 (emphasis added).

The treaty was signed on July 16, 1855. In this treaty, "[t]he Indians ceded some 25,000 square miles, including the Hellgate-Missoula region and the Clark Fork Valley trade route, both of which Stevens wanted for the railroad." NEZ PERCE INDIANS, 340.

4. Almost immediately post-treaty, Governor Stevens invoked the treaty right to travel in response to hostilities blocking the road to The Dalles the Nez Perce used to get winter supplies.

After concluding a treaty with the Blackfeet ensuring the use of a Common Buffalo Ground for tribes including the Nez Perce and CSKT, Stevens headed west to meet with the Spokanes and Coeur d'Alenes. On October 29, 1855, while on the Teton River on the eastern side of the Continental Divide, Stevens learned from his express rider, W.H. Pearson, that war had "exploded on both sides of the Cascades":

> The Indians of Puget Sound had attacked the settlements in that district, and along the Columbia River from the Cascades to the Colville Valley tribes had gone on the warpath. The Cayuses, Wallawallas, Umatillas, Palouses, and Yakimas were fighting . . . Indian agent A. J. Bolon had been murdered and an expedition of federal troops under Major Haller had been defeated and forced to retreat from the Yakima country . . . The Spokans and Coeur d'Alenes were about to join the hostiles, and even many of the Nez Perces were threatening to enter the war.
>
> Stevens and his party, said Pearson, were cut off. A large Indian army lay in wait in the Walla Walla Valley to wipe them out. Pearson himself had been chased by warriors from the Umatilla to the Nez Perce country, where Red

> Wolf and other friendly Indians had taken care of him. Then a Nez Perce had guided him hurriedly across the Lolo Trail to bring the news to Stevens.

NEZ PERCE INDIANS, at 343-44.

Stevens, traveling the Nez Perce Lolo Trail, overtook Looking Glass and the delegation of Nez Perce chiefs returning to their homes, who had already heard of the outbreak of hostilities and agreed to accompany Stevens across the mountains. *Id.* Stevens met with the Coeur d'Alenes and "[a]t the same time Stevens learned of the dangers still facing him on the road ahead." *Id.* at 349. The tribes father south had gathered to block his route, and Peopeo Moxmox [Walla Walla] "was said to have boasted that he would take Stevens' scalp himself." *Id.* Stevens dispatched most of the Nez Perce delegation to Lapwai to determine whether he could count on Nez Perce assistance, and then set out for Spokane country. Accompanied by three Nez Perce leaders, including Looking Glass, Stevens met with the Spokanes, Couer d'Alenes, and Colvilles, some of whom accused Stevens of being responsible for the war.

Stevens departed for Nez Perce country on December 6, 1855, and was met the next day by a messenger with the news that the Nez Perce had not joined the war and would help Stevens. JOURNAL OF OPERATIONS. On December 11, 1855, Stevens and his party "[p]ushed on as rapidly as the state of the roads, very heavy and slippery from the rain and melting snow,

would permit," reaching the Lapwai area, camping in an area with "208 Nez Perce Lodges, containing not less than 2000 men, wom[e]n and children, and able to muster 800 warriors." *Id.*

On December 12, 1855, Governor Stevens met with several principal chiefs of the Nez Perce, and recounted how he learned of the war as he was leaving Fort Benton, and had since received information that the Walla Wallas had entered the war and that it was feared the Cayuses would as well. Stevens stated, "I think that all the Nez Perces who have arms had better go with me, and then we can see how it is." JOURNAL OF OPERATIONS. Lawyer responded that before proceeding, "We want to talk and find out our hearts just as they are." Looking Glass made a similar point, responding that,

> It is better to find out all our hearts before you start. There are people in the way blocking up your road. We do not know what they will do. . . . I told you long ago that the Nez Perce trail to Walla Walla was the road for you to travel on. Although they may be fighting, it is the road, there is no other.

Id.

Governor Stevens assured the Nez Perce that "[i]f we find them [the other Indians] friendly we shall not fight them, but if we find them with arms in their hands, we shall." *Id.* Governor Stevens then invoked the treaty right to travel agreed to at the Walla Walla Council:

> The Cayuses, and Walla Wallas know that the Nez Perce are friendly to the Whites. What will they do to a Nez Perce who goes to the Dalles to get his winter supplies? Did not the Cayuses and Umatillas and Walla Wallas agree in the Treaty that the Nez Perces might travel in peace on all the roads through their country, the road to the Dalles?
>
> We agreed in the Treaty every Indian should have a right to travel on the road, yet now the hostile Indians are blocking it up.

Id.

The following day, December 13, 1855, Stevens met in a formal council with some 200 Nez Perce, including all the principal chiefs, with Lawyer presiding. Stevens acknowledged his appreciation for Nez Perce assurances that they were not joining the warring tribes: "My heart is glad to see you and hear you speak as you have done." *Id.* Stevens stated, "We parted [the Walla Walla Treaty Council] as friends—did they [the Indians who are fighting] really believe I was their enemy, and would they not trust to the agreements made with them?" *Id.*

Governor Stevens then, again, invoked the treaty right to travel to address the road to The Dalles that had been blocked up:

> Tomorrow I wish to start for the Walla Walla Valley. I want the Nez Perces, who have horses and guns to go with me.

> Recollect my friends, in the Treaty of Walla Walla, you had the right guaranteed to you, to travel on all the roads to the Dalles, all the roads through the Lower Country. Yet those roads have been blocked up against you, as well as against the Whites. Get ready therefore, we will start tomorrow if we can, and open the road. There will be payment made you for this service, when the President can be written to, and we receive his answer. You will be paid like the White Volunteers.

Id.

The Nez Perce chiefs "expressed their hearty concurrence in the sentiments expressed by the Governor, and said their Warriors should be ready if possible tomorrow." *Id.*

The following evening, December 14, 1855, after Stevens' men began moving out and the Nez Perce prepared to accompany Stevens, a messenger arrived with news that a large army of volunteers had defeated the hostile Indians in a four-day battle in the Walla Walla valley and scattered the Indians. Sixty-nine Nez Perces accompanied Stevens as an honor guard to Walla Walla. NEZ PERCE INDIANS, at 356. No trouble was encountered, and upon reaching Walla Walla, Stevens deemed his own party sufficient in numbers to march to The Dalles, and sent the Nez Perce auxiliaries back to their home country, issuing orders providing that Nez Perce volunteers be mustered out of the service with compensation. JOURNAL OF OPERATIONS, December 29 and 31, 1855.

5. Nez Perce and CSKT travel and trade continue to be significant following the Treaty.

Travel and trade continued to be significant to the Nez Perce and CSKT following the treaties. Stevens, for his part, became an advocate for the treaties in his speeches before Congress. *E.g.*, House Delegate Isaac Stevens to J.W. Nesmith, Supt. Ind. Affairs, January 18, 1858 (Stevens Papers, University of Washington Library, Reel 3). And, for example, the Commissioner of Indian Affairs' Report to Congress in 1860 noted, "[t]hese Indians *have large bands of horses, which they sell to the traders, or drive to Walla-Walla and the Dalles, and exchange for blankets, clothing, and groceries.*" Report of the Commissioner of Indian Affairs, 1860, H. Ex. Doc. 1, Vol. 1 (1861) (emphasis added).

The Nez Perce Tribe and CSKT, and their members, view their treaty as "sacred" and "sacrosanct" documents whose importance "cannot be overstated," similar to testimony offered by the Yakama in *Yakama Indian Nation*, 955 F. Supp. at 1237-38 (describing testimony of Yakama elders and experts). The current Chairman of the Nez Perce Tribe, Shannon Wheeler, a descendant of Kool-kool-tick-lih-kin (who was present at the Treaty Council), for example, frequently refers to the treaty right to travel as a protection of "sacred economic security" for the Nez Perce. Chairman's Report to the Nez Perce General Council, September, 2018. As such, it is not some ancient relic from the past, but rather a foundation to maintain a way of life no less important than any other provision of the Treaty.

Similarly, the CSKT view the Treaty of Hellgate as a direct connection to the tribal leaders who negotiated it with the United States, and know that those tribal leaders sought to preserve the culture and traditional life-ways of the Salish, Pend d'Oreille, and Kootenai people—including the right to travel—that would ensure the tribes' political and economic survival in a rapidly changing world.

Today, economic development for the Nez Perce and CSKT continues to rely on economic tools involving travel, trade, and commerce that led areas like Celilo Falls, for example, to be described as "[t]he Great Mart of all this Country [that the Nez Perce] visit for the purpose of tradeing horses buffalow robes for beeds, and Such articles as they have not"[7] by Lewis and Clark, and as the "Wall Street of the West" more recently.[8]

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[7] JOURNALS OF THE LEWIS AND CLARK EXPEDITION (Gary E. Moulton, ed.), April 16, 1806, at https://lewisandclarkjournals.unl.edu/item/lc.jrn.1806-04-16#lc.jrn.1806-04-16.03 (last visited September 20, 2018).

[8] *Expressing the sense of the House of Representatives concerning the 50th anniversary of the flooding of Celilo Falls*, H.RES. 217, 110th Cong. (April 17, 2007).

B. The arguments of Petitioner and its supporters which seek to render the Treaty right to travel meaningless, are fatally flawed, and must be rejected.

1. Treaties may not be interpreted divorced from an examination of the understanding of the Treaty Indians.

This Court, in examining Article III of the Yakama Treaty over a century ago with respect to the right to "take fish at all usual and accustomed places in common with the citizens of the territory" rejected the notion that the Indians "acquired no rights but what any inhabitant of the territory or state would have"—that is acquired no rights but such as they would have had without any treaty—emphasizing that that would be "an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more." *United States v. Winans*, 198 U.S. 380 (1905).

This Court again, in examining the Article III "in common with" right in the Yakama Treaty, emphasized the importance of interpreting treaties as the Treaty Indians would have understood them. *United States v. Tulee*, 315 U.S. 681 (1942); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

In *Yakama Indian Nation*, the court emphasized, "Notably, the Treaty does not include a restriction on the Yakamas' right to travel; rather it secures a right to travel." 955 F. Supp. at 1246. "[A]s the Yakamas

understood this term, no impediment was placed on their customary practice of travel or their right to travel to market." *Id.* at 1247. The court emphasized that no evidence suggests that the term "in common with" placed Indians "in the same category as non-Indians with respect to any tax or fee the latter must bear with respect to public roads." *Id.* Stevens "explicitly guaranteed that the Yakamas would retain the right to travel outside the reservation in pursuit of their traditional practices of fishing, hunting, and gathering, as well as taking goods to market." *Id.* In the terms of the bargain "no reference is made to other conditions such as payment for or maintenance of public roads, either on or off-reservation." *Id.* at 1247-48. "[T]he Yakamas would have naturally understood that they would be able to travel the public highways without restriction." *Id.* After emphasizing that Stevens "was well aware of the Yakamas' far-ranging patterns of travel and the importance of travel to Yakama culture" the court found that "No evidence suggests that Stevens communicated an intent to restrict the Yakamas' right to travel, such as demanding payment or fees for the construction of public roads." *Id.* Thus, the language of the Treaty, when viewed in the historical context as the Yakamas would have understood it, "unambiguously reserves to the Yakamas the right to travel the public highways without restriction for purposes of hauling goods to market." *Id.* The court noted "The record clearly demonstrates the Yakamas understood the Treaty to preserve their right to travel, much as it secured their right to fish in usual and accustomed places." *Id.* at 1249. The court of appeals

affirmed, after reviewing the Treaty Minutes and the district court's findings of fact. *Cree II*, 157 F.3d at 771.

Yakama Indian Nation and *Cree II* demonstrate that the treaty construction arguments made by Petitioner and its supporters have no merit.

First, this Court's long-standing rules for interpreting Indian treaties are, alone, enough to reject the two approaches to Treaty construction offered by the *amici* states: parsing Treaty language "according to the technical meaning of the words to learned lawyers" and construing Treaty language without any examination of the Treaty Indians. *Amici* States' Br. at 15-17. The lengths to which *amici* states must go to offer a tortured construction of the Treaty right is remarkable, and divorced from the factual examination and findings of fact and law in *Yakama Indian Nation* and *Cree II*.

Second, as this Court in *United States v. Winans* held with respect to the Treaty right of taking fish, *Yakama Indian Nation*, affirmed by *Cree II*, rejected the argument that the treaty right to travel meant nothing more than what any other citizen of the territory would possess. This argument was thoroughly made, considered, and rejected.

Third, Petitioner's efforts to suggest that the Yakama Treaty should be construed by examining some other tribe's experience in some other region of the country (the Utah Tribe) (Pet. Br. at 38 n. 18) that bears no relationship to the history of the Pacific and Inland Northwest, cannot be squared with a required

precise examination of the context and history of *these* treaties.

Fourth, *amici* states attempt to obtain purchase by arguing that the treaty language is the right to "travel" and does not use the word "trade," citing a statement by the court in *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014). This soundbite says too little and attempts to prove too much. *King Mountain* itself is clear that this reading does not—and cannot under rules for interpreting Indian treaties— end the inquiry into the meaning of the right as the Treaty Indians would have understood it. None of the cases following *Yakama Indian Nation* and *Cree II* alter the fundamental findings of fact and conclusions of law concerning the Treaty Indians' understanding of the right to travel, and *King Mountain* specifically references all of those cases—*Yakama Indian Nation*, *Cree II*, *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), *Ramsey v. United States*, 302 F.3d 1074 (9th Cir. 2002)—to distinguish the situation that was before it.

II. THE "PARADE OF HORRIBLES" ARGUMENTS ADVANCED BY PETITIONER AND ITS SUPPORTERS ARE UNFOUNDED.

A. A state's inability to impose a tax such as the one at issue does not necessarily mean that the good is untaxed or that another sovereign will not collect a tax.

Petitioner and its supporters attempt to leave the impression that if a state cannot collect a tax, this

means the tax goes uncollected. This is not the case. As sovereigns, tribes may collect a tax, and may use those revenues for purposes similar to those of other governments. The Nez Perce Tribe, for example, has chosen to collect a fuel tax from its retailers that is dedicated to transportation-related expenses including road maintenance costs. It did so before entering into a fuel tax agreement with Idaho and it continues to do so pursuant to an agreement that the Nez Perce Tribe and Idaho entered into in 2007.

B. Washington's transportation infrastructure expenses are not a sufficient legal basis for abrogating a judicially affirmed treaty right.

Petitioner's supporters argue that Cougar Den's activities "impact Washington State fuel tax revenues, diminishing funds available for necessary transportation operations and capital projects at a time when Washington transportation needs are not being met due to lagging revenues." *Amici* Washington Oil Marketers Ass'n *et al.* Br. at 18. The inability of Washington to collect a fuel tax from Cougar Den to address its transportation infrastructure needs accompanies an argument that the Washington Supreme Court's application of the treaty right to this particular state fuel tax should be overturned.

However, as the article cited by Petitioner's supporters explains,[9] Washington is currently studying other approaches to address the reality that road construction and maintenance expenses significantly outpace—by orders of magnitude—its fuel tax revenue. Washington, which does not have a state income tax, is studying options including a "pay-by-the-mile" road usage charge on miles driven on the highway. *Id.* While that particular approach, under the established case law, would be an impermissible infringement on the treaty right to travel, it serves to illustrate two points. First, state regulations can and do change, as do state and tribal relationships; the facts specific to this narrow state fuel tax dispute should not be used to abrogate the judicially affirmed treaty right to travel in resolving this case or in addressing some future regulation-specific harm that Petitioner or its supporters may envision. Second, respectfully, any ruling from this Court on the intersection of the treaty right to travel and the very specific state fuel tax at issue should not alter the Treaty Indians' understanding of the right to travel set forth in *Yakama Indian Nation* and affirmed by the Court of Appeals in *Cree II*.

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[9] David Gutman, *Washington state to test pay-by-the-mile as a way to fund highways*, Seattle Times (September 6, 2017) (cited in Washington Oil Marketers Ass'n *et al.* Br. at 18 n. 16).

C. There are no current disputes concerning the treaty right to travel involving the Nez Perce Tribe, CSKT, Idaho, Montana, or any other state.

Currently, there are no disputes concerning the treaty right to travel involving the Nez Perce Tribe, CSKT, Idaho, Montana, or any other state. Idaho has not contacted the Nez Perce Tribe to indicate it has a concern with the treaty-reserved right to travel. Idaho did not contact the Nez Perce Tribe to discuss what it may see as the potential consequences of the Washington Supreme Court's decision. The state *amici* brief in support of Petitioner, which Idaho joined, does not identify any active concern with the Nez Perce Tribe and the treaty-reserved right to travel. And the state *amici* brief does not identify any active concern involving the CSKT.

D. Idaho and Montana have chosen to enter into fuel tax agreements with the Nez Perce Tribe and CSKT.

Many of the assumptions Petitioner and its supporters make concerning state and tribal relations and state and tribal fuel tax agreements—that serve as a launching point for their "parade of horribles" arguments—ignore the intricacies and nuances of state-tribal relationships and the agreements that have been reached.

1. Both Idaho and Montana have entered into fuel tax agreements with the Nez Perce Tribe and

CSKT, respectively. For Idaho and the Nez Perce, these agreements were preceded by contentious litigation and have now been in place for well over a decade. For Montana and CSKT, these agreements have "resolved much of the previous legal uncertainty and economic disarray caused by competing and conflicting state and tribal taxation frameworks," avoiding "costly and prolonged litigation—and the resultant problems for private business development on reservations. . . ." Governor's Counsel State-Tribal Revenue Sharing Memorandum to Montana Legislature 1 (State-Tribal Relations Interim Committee Hearing, October 21-22, 2015).[10] Montana's state-tribal tax agreements are intended to "assist in the administration of taxes and prevent the double taxation of certain economic transactions over which both the tribe and state have taxation authority." *Id.*

2. The mechanics of the fuel tax agreements that Idaho and Montana entered into with the Nez Perce Tribe and CSKT, respectively, are distinctly different from each other, and different from the approach Washington describes as in place for tribes in Washington other than Yakama. This illustrates that sovereigns may choose different approaches to finding acceptable interest-based resolutions reflecting the nuances of state-tribal relationships and the intricacies of state regulations, and that the approach Washington describes that it has entered into with other

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[10] Available at: https://leg.mt.gov/css/Committees/Interim/2015-2016/State-Tribal-Relations/Meetings/Oct-2015/oct-2016.html (last visited September 20, 2018).

tribes in Washington should not be generalized to other situations.

The CSKT-Montana Agreement is in place until 2022. The CSKT did not concede the diminution of any Treaty-reserved rights (including the Article III right to travel), but agreed that as long as the Agreement is in effect and Montana makes the required quarterly payments, the CSKT will not participate in litigation challenging state taxation of motor fuels on the Flathead Reservation.

The CSKT and Montana have committed to good faith negotiations for successive ten year terms and there is nothing to indicate that the Agreement will not be renewed. Any concerns raised by the Petitioner or its *amici* regarding what might occur in Montana should this Court affirm the Washington Supreme Court's decision below are unfounded. (See, e.g., *Amici* States' concern that affirmance "may encourage" the CSKT and Nez Perce to "adopt business models that allow them to 'market' their exemption from taxation" nationwide. Brief of *Amici* States, p. 6). The Montana-CSKT partnership has worked well. The predictable stream of revenue generated by the Agreement is used to supplement funding for programs and services needed by CSKT tribal members. The "parade of horribles" theorized by Petitioner and its supporters are not a reality in Montana.

E. Petitioner's arguments about opening a Pandora's Box with respect to the intersection of the treaty right to travel with public safety are unfounded.

1. Despite Petitioner's continued arguments before this Court, neither this case, nor the treaty right to travel, places a cloud over Washington's ability to regulate Yakama use of Washington highways with respect to licensing, weight limits or other safety rules, speed limits, felon-in-possession of firearm prohibitions, or regulations that prohibit certain fruit from being hauled from a quarantined area through a pest-free area. Pet. Br. at 44-45. Petitioner's fears concerning these types of public safety regulations were rejected by both the majority and dissenting opinions of the Washington State Supreme Court. Pet. App. at 14a-16a (majority); 27a (dissent). Similar arguments that the treaty right to travel would sanction transport of "illegal narcotics" or "forbidden fruits [and] vegetables" have previously been rejected as "unfounded if not disingenuous." *Smiskin*, 487 F.3d at 1270-71. As the Yakama Nation explained:

> The Yakama Nation is a sovereign nation, with its own government, laws and courts, not a rogue organization or menace to civil order . . .
>
> [T]he Nation has no interest in promoting, condoning, or protecting activities by its members that pose real dangers to public health, public safety, natural resources, or public infrastructure. [T]he Yakama Nation

> and its members share the interest all citizens have in public health, public safety, conservation and equitable exploitation of natural resources, and adequate public infrastructure.

Id. at 1271.

Like Yakama, the Nez Perce Tribe and CSKT have protective governmental interests that as a practical matter nullify Petitioner's public safety fears.

2. Neither is this case about the intersection of the treaty right to travel with the intricacies of state tobacco taxes or federal tobacco taxes, which involve a distinct and different set of regulatory regimes and factual inquiries from the Washington motor fuel tax at issue and must be decided on those specific facts and regulations. The Nez Perce Tribe and CSKT have no state-tribal tobacco tax disputes and implement campaigns to prevent and address tobacco use, working in concert with federal, state, and non-governmental partners.

* * *

As tribes with similar historical records and similar reserved treaty rights, the Nez Perce Tribe and CSKT urge this Court in the case before it to ensure that the Yakama Treaty's express protection of the right to travel is interpreted consistent with the understanding of the Treaty Indians, as the Washington Supreme Court did below.

CONCLUSION

The judgment of the Washington Supreme Court should be affirmed.

Respectfully submitted,

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